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THE LAW AND PRACTICE RELATING TO FOREIGN JUDGMENTS.

ADDITIONAL NOTES AND RECENT CASES ON SERVICE OUT OF THE JURISDICTION.

F. T. PIGGOTT.

LONDON:
WILLIAM CLOWES AND SONS, LIMITED,
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ADDITIONAL NOTES AND RECENT CASES

ON

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BEING AN

APPENDIX TO CHAPTER VIII

OF

THE LAW AND PRACTICE

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AND

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[*SECOND EDITION.*]

BY

FRANCIS TAYLOR PIGGOTT, M.A., LL.M.

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW;
AUTHOR OF "THE PRINCIPLES OF THE LAW OF TORTS."

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TABLE OF CASES.

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Service of documents other than writs.

[p. 215.]

General rule.

THE general rule that process of any kind can only be served on a person out of the jurisdiction by virtue of a statutory power, was dwelt on by Earl Selborne, C., in *Berkley* v. *Thompson*: 'A 'person resident abroad, and not brought by any special statute or 'legislation within the jurisdiction, is *primâ facie* not subject to the 'process of a foreign court, he must be found within the jurisdic-'tion to be bound by it.' The rule was applied in the case of a bastardy summons; leave to serve it on the putative father in Scotland was refused, in the absence of a statute allowing such leave to be given.

Berkley v. *Thompson.* 10 App: Ca: 45.

The defendant's forum.

The forum of the defendant to which the maxim *actor sequitur forum rei* refers, is the forum of his actual presence, and not that of his residence or domicil, as is sometimes stated.

Summons for a receiver.

Equitable execution.

Weldon v. *Gounod.* 1 Times L. R. 631 [not reported in C. A.].

In *Weldon* v. *Gounod* the rule was applied to the service of a summons for the appointment of a receiver under the provisions of the Judicature Act 1873, sec: 25, subs: 8, as to equitable execution. The defendant was an alien resident in France. The plaintiff had obtained leave to serve notice of a writ out of the jurisdiction: the defendant appeared, and judgment having been signed, the damages were assessed by a sheriff's jury. It appeared that the defendant would shortly afterwards become entitled to have certain sums paid over to him, as his share of the proceeds of a musical performance. The plaintiff in consequence applied for a receiver to be appointed. The Divisional Court refused to allow service of the summons out of the jurisdiction, and this refusal was upheld by the Court of Appeal.

This decision raises a point of great importance. The defendant had appeared, and consequently had given an address for service, at which, under Order LXVII, rule 2, all further documents in the suit could be left. Summonses would therefore be left at

[p. 225.]

The address for service.

this address, and it would be unnecessary to apply for leave to serve them out of the jurisdiction. It would appear, however, that this address for service only holds good until the trial of the action, otherwise the summons for the receiver could have been left there.

Query, if the case applies to *ex parte* application.

It is not clear, however, why a summons was resorted to in this case in order to obtain equitable execution; for under Order L, rule 6, the application for a receiver may be made *ex parte;* and no distinction is made between defendants who are without, and those who are within the jurisdiction. Apart, therefore, from the considerations which were raised by the application in this case, it is suggested that where it is 'just and convenient' the Court would appoint a receiver on an *ex parte* application, even though the defendant is out of the jurisdiction. In an earlier case, *Coney* v. *Bennett, re Coney*, where an order to pay money into Court had been disobeyed, Chitty, J., appointed a receiver, apparently on the hearing of a summons, the person on whom the order was made being a subject who had since gone abroad.

Coney v. *Bennett.* 29 Sol: Jo: 555.

Garnishee order. [ORDER XLV. rule 1.]

The same considerations suggest that a garnishee order would be made although the defendant to the suit were out of the jurisdiction, the order being on an *ex parte* application. It would indeed be a curious result if, after the plaintiff has been allowed to proceed against an absent defendant, his remedies on the judgment are limited to such property as can be seized by the Sheriff, and that he should be denied the privilege of satisfying himself out of the defendant's other property by means of equitable execution.

All actions against absent defendants must be commenced in High Court.

It is, of course, a direct consequence of the rule we have been considering, that all actions against a defendant abroad, whether subject or alien, whatever the amount, must be brought in the High Court, there being no provision for service out of the jurisdiction in the County Court Acts (*Mendelssohn* v. *Hoppe*).

Mendelssohn v. *Hoppe.* W. N. 1884, p. 31.

Appointment of trustees.

In *re Greenwood's trusts* and *re Lightbody's trusts*, orders were made on petitions for the appointment of new trustees, in both cases one of the *cestui-que-trustent* being abroad. The question in these cases was, however, the power of the Court, under the Trustee Acts 1850 and 1852 (13 & 14 Vic: c. 60; 15 & 16 Vic: c. 55), to dispense with service on persons out of the jurisdiction, who would otherwise be necessary parties to the proceedings.

re Greenwood's trusts. 27 Ch: D. 359. *re Lightbody's trusts.* W. N. 1885, p. 3.

A similar question arose in *Hacking* v. *Whalley* under the Petition Act 1876 (39 & 40 Vic: c. 17, s. 3), where some of the parties with small interests were resident abroad. Kay, J., made

Hacking v. *Whalley.* 51 L. J: Ch: 944.

Chapter VIII.

an order to dispense with serving the judgment upon them, but refused to dispense with advertisements in the leading local papers. In an earlier case, *Barton* v. *Barton*, Malins, V.C., had made a similar order, but had also dispensed with the advertisements abroad.

Barton v. *Barton.* W. N. 1877, p. 23.

In *Hyde* v. *Clark* a foreclosure decree in favour of the mortgagees in possession, was ordered to be served on some of the trustees and beneficiaries under the will who were in America, and against whom the bill had been ordered to be taken *pro confesso* at the hearing: advertisements were also ordered in American and English newspapers.

Hyde v. *Clark.* W. N. 1874, p. 196.

Foreclosure decree.

Order XI.

It must be remembered that the rules under which leave is now given to serve the writ, or notice of the writ, out of the jurisdiction, state specifically those causes of action in respect of which alone the leave will be granted. There are not wanting, however, in some of the cases, references to the rule of the Common Law Procedure Act 1852, s. 18, which simply required the cause of action to be one which had arisen within the jurisdiction. In *Shearman* v. *Findlay* both this rule and the rules of 1875 seem to have been present to the minds of the Court.

ORDER XI. General considerations. [p. 219.]

Shearman v. *Findlay.* 32 W. R. 122.

Decisions prior to 1883 must therefore, where necessary and when practicable, be adapted to the rules promulgated in that year.

The important rule laid down in *Diamond* v. *Sutton* must also be remembered.

Diamond v. *Sutton.* L. R. 1 Ex: 130.

Joinder of cause within, with cause not within rules not allowed.

If the plaintiff has two causes of action against the same defendant who is out of the jurisdiction, one of which falls within, and the other without, the rules of Order XI, he cannot join them, and obtain leave to issue the entire writ because he shows a proper case in one part of it. And it would seem also that he cannot join a cause outside the rules, after leave has been given to issue the writ in a proper case.

Rule 1 (b).

Liabilities affecting land within the jurisdiction. [p. 219.]

Agnew v. *Usher.* 14 Q. B. D. 78.

The Queen's Bench Division, in *Agnew* v. *Usher*, held that an action for rent of premises situate in England does not fall within rule 1 (b). Smith, J., held that 'enforced,' meant 'specifically performed.' This point was not considered in the Court of Appeal.

Rule 1 (c).

Contracts. [pp: 148, 220.]

The subsection dealing with contracts raises some points of great importance, which have not at present come before the

Courts; the change introduced by it seems to be more than the mere verbal change which it appeared at first sight.

[Unless the defendant is domiciled or ordinarily resident in Scotland or Ireland.]

The cause of action being the 'breach (or alleged breach) 'within the jurisdiction of any contract wherever made, which, 'according to the terms thereof, ought to be performed within the 'jurisdiction,' the first question is as to the true significance of the words 'which, according to the terms thereof:' do they mean that the service will be allowed only when the contract is expressed to be performed in England; or, more generally, when England as the place of performance is to be inferred from the other terms of the contract?

General considerations raised by the rule.

In the absence of express decision, it is impossible here to do more than point out shortly the arguments with which either view may be supported. On the one hand it may be said that the insertion of words into a sentence, which, if they were omitted, would without doubt include contracts in which England is the expressed place of performance, as well as those in which England is to be inferred as the place (or as one among many places) of performance, must inevitably point to the intentional exclusion of the latter class. On the other hand, the terms of a contract are, some express and some implied, and therefore it may be argued that, in order to cut out contracts to be performed in England according to their implied terms, the word 'express' would necessarily have to be read into this sentence. The result, therefore, is either that the words are surplusage, or that the word 'express' must be incorporated.

Contract not to do something.

Secondly, and supposing the first contention to be inaccurate, it is to be remembered that the due performance of a contract may require some act not to be done, and that consequently the breach would then consist of an act of commission. In *Jackson* v. *Spittall* the contract, entered into in the Isle of Man, was not to indorse a bill of exchange delivered to the defendant as security: the breach, by indorsing it over, took place in Manchester. It would seem that, if no effect is given to the words 'according to the terms thereof,' such a case would still fall within the rule; for an act which ought not to be done at all nor anywhere, ought not to be done in England, and consequently the contract 'ought to be performed' within the jurisdiction.

Jackson v. *Spittall.* L. R. 5 C. P. 542.

Two further points suggest themselves in connection with this subject: first, as to the place of making a contract; secondly, as to the place of breach of a contract.

Place where

A contract is made directly it is completed, and the place of

Chapter VIII.

making is therefore the place where the act of completion is performed. The rules as to contracts by correspondence are too well known to need recapitulation here. A contract may also be completed by telegraph: or by communication sent by the agent of the proposer, or by the agent of the acceptor. One general rule seems applicable to all cases: When an acceptance is irrevocably despatched, that is, when the acceptor has put the answer out of his own control and beyond recall, then the contract is completed and both sides are bound. And the place where the answer ceases to be under the sender's control is the place where the contract is made. A contract which gives rise to a negative obligation, or duty to forbear, is manifestly broken at the place where the act which ought not to have been done has been done. contract made.

A contract which gives rise to a positive obligation may have either in its terms an express place of performance, or from its terms an implied place of performance, and the place of breach must necessarily correspond with the place of performance in either case. Place of breach.

Speckhart v. *Campbell.* Bitt: Rep: in Ch: 248, *n.*

Speckhart v. *Campbell* has been overruled by the Court of Appeal, on the ground that the injunction sought could have no effect in Scotland, and therefore, as a matter of discretion, the leave should not have been granted. Rule 1 (f). Injunctions. [p. 220.]*

The report is very meagre, and the point of great importance. This subsection is considered generally on page 151.

exp: McPhail, 12 Ch: D. 632.

It may be noted that the ground of the decision differs from that in *ex parte McPhail:* there Jessel, M.R., refused the leave because the injunction could as soon have been obtained in Scotland.

Tozier v. *Hawkins.* W. N. 1885, p. 140.

In *Tozier* v. *Hawkins* leave was given to serve the writ in an action for an injunction to restrain the posting of libellous post-cards in Dublin, and for damages.

Lisbon-Berlyn v. *Heddle.* 52 L. T. 796.

In *Lisbon-Berlyn Gold Fields* v. *Heddle* the defendant in Scotland had threatened to present a petition to wind up the Company, in respect of a disputed debt. The action was brought for an injunction to restrain the presentation or advertising of the petition; also for the rescission of a contract executed in Scotland to be performed in the Transvaal, and which had been broken; and for the return of certain moneys which had been

* The words 'or any nuisance within the jurisdiction' have been accidentally omitted after the word 'jurisdiction' in printing rule 1 (f) on page 220.

paid under it. Kay, J., held that it was no ground for refusing the leave because the writ asked for more than an injunction. Nothing seems to have been said as to the other parts of the claim and the application of the rule laid down in *Diamond* v. *Sutton*.

[*cf*: p. 5.]

Rule 1 (g).

Co-defendants.

[p. 220.]

Meaning of 'proper party.'

The words 'proper party' do not mean any person who may be brought in as a third party for collateral purposes, but only persons against whom the original action could be properly brought. In other words, the rule is limited to co-defendants. (*Spiller* v. *Bristol Steam Navigation Co.*)

Spiller v. *Bristol Co*: 50 L. T. 400, 414.

The suggestion made on page 152, with regard to the true bearing of this rule, has been borne out by the decision in *The Yorkshire Tannery Co.* v. *Eglinton*, where it was laid down that the defendant who is within the jurisdiction must be the person who is *substantially* sued: moreover, he must be served with the writ before the application for leave to serve the parties abroad can be made. Pearson, J., said: 'I cannot think that it is the 'intention of this rule of Court to bring into this country an 'action which is properly a Scotch action, simply because 'some person who had some trifling interest in the matter in 'dispute, and who was not a principal defendant, was made a 'defendant and was resident here.' The facts were these. The dispute was between a Scotch and an English company. The Scotch complained that the English had failed to pay a minimum royalty under an agreement for the use of a patent. The English asserted that they had been induced to enter into the agreement by the fraud and misrepresentation of the Scotch company and their agent as to the value of the patent. The agent was in England. The principle of the decision would seem to be that, although the principal and agent are joint tortfeasors, it is not sufficient for the agent to be within the jurisdiction in order to get leave to serve the principal abroad. Some curious questions are likely to arise in connection with this subject.

Yorkshire Tannery v. *Eglinton*. 54 L. J: Ch: 81.

Person within jurisdiction must be person substantially sued.

Case of joint tortfeasors.

Case of joint contractors.

A simple case of joint contractors occurred in *SS. Thanemore* v. *Thompson*, which was an action against forty-four underwriters, two only of whom were in England. Service on the remainder was allowed.

Thanemore v. *Thompson*. 52 L. T. 552.

Leave will be given to join persons out of the jurisdiction who are 'proper' although not 'necessary' parties to the action. Thus a promissory note was made by F. and indorsed by him to P. & W., and by them to the plaintiff. The action was against

Chapter VIII.

the defendant as trustee in bankruptcy of P. & W., the plaintiff having received the note from them for value. Leave was given to serve F. out of the jurisdiction. (*Sykes* v. *Schofield.*)

Sykes v. *Schofield.* 28 Sol: Jo: 477.

Rule 4.

Affidavit for leave.

A very important question arises as to what materials are to be furnished to the Judge to enable him to exercise his discretion under this rule.

Discretion of judge.

White v. *Macgregor.* 46 J. P. 775.

Hardingham v. *Rowan.* 24 Sol: Jo: 309.

It was laid down in *White* v. *Macgregor* that, the application being *ex parte*, all the facts within the plaintiff's knowledge should be set out in the affidavits: and in *Hardringham* v. *Rowan*, where the plaintiff had not been very candid in his affidavit, the costs of the application to set aside the writ, which was refused, were made costs in the cause.

[p. 212.]

Plaintiff's affidavit must be candid.

[Jessel, M.R.]

The question, however, more frequently arises on the application to set aside the service, on additional materials supplied by the defendant. It becomes important, therefore, to consider what fresh materials the defendant may adduce, in order that the Court may, on appeal, exercise its discretion in setting aside the writ.

Nature of defendant's affidavit.

The general rule is that the enquiry should be limited to ascertain whether the facts as stated by the plaintiff bring the case within Order XI, and to the relative convenience of trying the case in England or in the country where the defendant may be at the time. The cases have, however, considerably amplified this rule. In *Foley* v. *Maillardet*, certain stock, the subject matter of the action, was shewn by the defendant not to be locally situate in England. In *Fowler* v. *Barstow* the defendant denied the plaintiff's affidavit absolutely, and he, in his affidavit in reply, did not deny a single material statement.

[p. 228.]

Foley v. *Maillardet.* 12 W. R. 355.

Fowler v. *Barstow.* 20 Ch: D. 240.

Agnew v. *Usher.* 51 L. T. 752.

In *Agnew* v. *Usher*, which was an action for rent of premises in England, against assignees of the lease who were resident in Scotland, it having been deposited with them as mortgagees; they proved in their affidavit that they had not only not executed the deed of assignment, but had repudiated it.*

Now, in these cases it appears at first sight that the defendants in their affidavits brought forward their versions of the cases, and obtained decisions on the merits, notwithstanding the general rule stated above. But if they are carefully examined they really did no more than point out a weakness or defect in the plaintiff's case as stated in his own affidavit. The defendant

Soc: Gen: v. *Dreyfus.* 29 Ch: D. 239.

* *The Société Générale de Paris* v. *Dreyfus* is a similar case, but it is believed to be on its way to the Court of Appeal, and is therefore omitted.

He may nonsuit plaintiff on his own facts.

in *Foley* v. *Maillardet* pointed out that there was no stock in England: in *Fowler* v. *Barstow*, that the plaintiff's story was entirely untrue: in *Agnew* v. *Usher*, that there was a very important link missing in the plaintiff's chain of evidence. So far as the facts are concerned, therefore, these cases establish that the defendant may shew that the plaintiff has no case; he may, in effect, at once nonsuit him. But he must always do this on the plaintiff's own facts [*cf:* Bowen, L.J., in *Agnew* v. *Usher*]. The Court will not receive fresh facts from the defendant, and so enter into the merits of the case: it seems clear that if, in *Fowler* v. *Barstow*, the plaintiff had replied to, or denied, the defendant's affidavit, the Court would have refused to enter into the dispute thus raised, and would have decided as to the leave to serve the writ, on the plaintiff's first affidavit.

Foley v. *Maillardet.* 12 W. R. 355.

Agnew v. *Usher.* 51 L. T. 752.

Fowler v. *Barstow.* 20 Ch: D. 240.

If, on the affidavits, a doubt remains whether there is a cause of action falling within Order XI, the Court has occasionally put the plaintiff on an undertaking to prove it at the trial or to submit to a nonsuit. (See *Diamond* v. *Sutton*, followed in *Nottage* v. *Aitken.*)

Diamond v. *Sutton.* L. R. 1 Ex: 130.

Nottage v. *Aitken.* 25 Sol: Jo: 834.

In *Diamond* v. *Sutton* the action was in respect of matters falling within the order, and also of matters outside the order; and the above rule was applied strictly, the plaintiff undertaking not only to prove the first cause of action, but to confine himself to that.

[*cf:* p. 5.]

May also prove an absolute bar to the action.

The rule was still further extended by the Court of Appeal in *Call* v. *Oppenheim.* The defendant may bring forward facts to shew that there is an absolute bar in law to the plaintiff's action.

The action was on a bill of exchange. The defendant stated that he had already obtained judgment on the same bill in France. The plaintiff set out a short-hand writer's note of the judgment for the purpose of shewing that the French judgment had not proceeded on the merits of the case: it raised the important question of *status* which arises in consequence of a foreign decree of prodigality, and appointment of a *conseil judiciaire.* Some members of the Court doubted whether, on this state of facts, the judgment would have been a bar to the action: the principle of Lord Esher, M.R.'s judgment was this: generally the foreign judgment would be a complete defence; and if it were so in this case, the writ would be set aside: but there was a doubt, and therefore the question might be argued.

Call v. *Oppenheim.* 1 Times L. R. 622.

Discussion of

It will be noticed that the French judgment was practically

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brought before the Court by the plaintiff, and that consequently the defendant's affidavit, although it took the form of, did not really amount to, the plea of *res judicata:* and it is submitted that the decision does not absolve the defendant in ordinary cases, from setting out the judgment in accordance with section 7 of Lord Brougham's Act (No. 2). But if this is done in simple cases, the writ will be set aside. *Call* v. *Oppenheim.*

14 & 15 Vic: c. 99. [Chap: III. p. 94.]

The same principle would apply to a defence under the Statute of Limitations, subject to any question which might arise under the Statute 4 & 5 Anne, c. 16, s. 19.*

And generally, therefore, the defendant may bring forward such facts, not as to the merits but as to the law of the case, as will enable the Court to determine whether it is frivolous or not, and to enable it to exercise its discretion.

In connection with rule 5, Order III, rule 7, should be noted. [p. 224.]

O. iii. r. 7.

The writ shall state that upon payment of the plaintiff's claim, if it is for a debt or liquidated demand only, 'within the time 'allowed for appearance,' further proceedings will be stayed.

Bacon v. *Turner.* 34 L. T. 64.

The decision in *Bacon* v. *Turner* seems also to ignore sec: 10 (1) of the Naturalization Act 1870 (33 Vic: c. 14). [p. 225.]

Fowler v. *Barstow* is reported 20 Ch: D. 240. [pp: 224, 225, 228.]

Fish v. *Chatterton, re Livesay* is reported 47 L. T. 328. [p. 227.]

Order XII. Rule 30.

Application to set aside writ.

O. xii. r. 3.

A defendant, before appearing, shall be at liberty, without obtaining an order to enter, or entering a conditional appearance, to serve notice of motion to set aside the service upon him of the writ, or of notice of the writ, or to discharge the order authorising such service. [pp: 163, 228.]

The general principles on which the order will be made under this rule have already been discussed on page 9.

It seems clear that the proper course in all cases is to move the Court under the above rule: but the practice appears to be slightly different. A summons is not unfrequently taken out, and where the defendant relies only on the weakness of the plaintiff's case, the Judge in Chambers has usually decided the question; but where additional matter has been introduced, he has referred the question to the Court.

---

* If the defendant was abroad at the time the cause of action arose, and has remained abroad, it is presumed that there is no period of limitation.

Third Party Notices.

O. xvi. r. 48. [p. 230.] If the case does not come within the words of this rule when it is sought to serve a third party who is resident in England, it follows that it is not within the rule when it is sought to serve a third party resident in Scotland or elsewhere, and an application under Order XI, rule 1 (g) cannot be made. (*Spiller* v. *Bristol Steam Navigation Co.*)

Spiller v. *Bristol Co*: 50 L. T. 419.

Substituted Service.

[p. 231.] The principle suggested on page 231, that 'substituted service is not another way of reaching absent defendants,' has been amply justified by two recent cases.

Simple case of substituted service being refused.

Adler v. *Benjamin* was a simple example of an English subject temporarily absent from the country. His clerk had forwarded the writ. His brother had a power of attorney to act for him generally, and a copy of the writ had been left with him. An application to proceed on this service was refused.

Adler v. *Benjamin*. 1 Times L. R. 308.

In *Field* v. *Bennett*, an action for libel against the proprietor of the *New York Herald* and his manager in London, the manager had been served, and an application was made to substitute service on the manager in lieu of service on the proprietor. It was refused, Cave, J., laying down the general principle that the rules as to substituted service only apply where it is possible to serve the defendant if he could be found.

Field v. *Bennett*. 1 Times L. R. 374.

General principle as to substituted service.

This rule would apply to cases where leave has already been obtained to serve the writ under Order XI, and the attempts to find the defendant have been unsuccessful.

Service on Corporations.

[p. 232.] Service on agent of corporation.

In *Nutter* v. *Messageries Maritimes de France* service on the 'collecting agent' of a foreign company was held bad. The contract was made in Antwerp to be performed in Shanghai, the case, therefore, fell outside Order XI. It would seem that if the agency had been a 'branch office,' the manager of it could have been served. Smith, J., adopted Baron Bramwell's criterion: the person may be served if he could have been served were the company an English one. And he, under Order IX, rule 8, must be 'the mayor or other head officer, the town clerk, clerk, 'treasurer, or secretary.'

Nutter v. *Messageries de France*. 1 Times L. R. 644.

Persons who may be served. O. ix. r. 8.

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